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July 20, 2011

Honorable Chief Justice
Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

RE: *People v. Ronald Bruce Mendoza*
California Supreme Court, Case No. S065467
DEATH PENALTY CASE

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On May 4, 2011, pursuant to the Court's order of April 13, 2011, respondent filed a letter brief addressing the application of Penal Code section 1252[1] to this case. On June 16, 2011, pursuant to the Court's order of May 20, 2011, appellant filed a responsive letter brief. The Court permitted respondent until July 20, 2011, to file a reply. Respondent accordingly files this letter brief supporting the Court's use of section 1252 to reach the issue of the trial court's authority to strike a special circumstance.

I. THIS COURT MAY CONSIDER THE ISSUE OF THE TRIAL COURT'S AUTHORITY TO STRIKE THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

A. The Trial Court's Authority to Strike the Special Circumstance Is the Type of Issue Contemplated by Section 1252

Appellant first asserts that the state may only obtain review of an adverse ruling by three avenues: 1) appeal pursuant to section 1238, 2) writ of mandate, or 3) on a defendant's appeal pursuant to section 1252. (App. Letter Brief at p. 1.) Appellant

[1] All further statutory references are to the Penal Code unless otherwise designated.

further asserts that section 1252 exists only as a last resort, when the state could not have filed an appeal or writ of mandate. (App. Letter Brief at pp. 1-4.) Appellant states that the "arguably proper remedy" here would have been to file a writ of mandate, thus foreclosing the state from relying on section 1252. (App. Letter Brief at pp. 3-4.) As discussed below, however, section 1252 is the most appropriate remedy here.

Even if the state may not obtain review under section 1252 if it could have appealed (*People v. Braeseke* (1979) 25 Cal.3d 691, 700 ("*Braeseke*")), the same is not true of filing a writ of mandate or prohibition. No court has held that section 1252 may be used only when a writ could not issue. Indeed, such a rule would turn the purposes of writs and section 1252 on their heads, and effectively abrogate review under section 1252. In any event, writ review would have been inappropriate here.

A writ is generally an extraordinary and equitable measure, used only when there is no other remedy at law. (Code Civ. Proc., §§ 1086 [writ of mandate appropriate "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law"], 1103 [permitting writ of prohibition "where there is not a plain, speedy, and adequate remedy in the ordinary course of law"].) In contrast, section 1252 is broad, permitting the state to raise any issue "to secure an affirmance" that it could not have raised in its own appeal, which, as appellant recognizes, is strictly limited by section 1238.[2] (*Braeseke*, *supra*, 25 Cal.3d at pp. 698-701 [declining to limit section 1252 to cases where conviction would be reversed]; *see People v. Williams* (2005) 35 Cal.4th 817, 822-823 [discussing limitation on People's right to appeal].) In other words, a writ is the remedy of last resort, not section 1252.

Respondent here has an adequate remedy in section 1252. A writ therefore would have been improper. This is particularly true where, as here, an appeal is automatic. Using section 1252 to raise the issue of the trial court's authority to strike one of three special circumstance jury findings, as opposed to filing a separate writ, conserves judicial resources and is consistent with the purposes of both writs and section 1252.

Appellant also attempts to confine the state's right to raise an issue pursuant to section 1252 to the facts of *Braeseke*. (App. Letter Brief at pp. 2-3.) Appellant's interpretation of *Braeseke* and section 1252 is insupportably narrow. In any event, the situation here is very similar to that in *Braeseke*.

In *Braeseke*, the trial court suppressed the defendant's first statement to police but held his subsequent statements and physical evidence were admissible. (*Braeseke*, *supra*,

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[2] Notably, appellant does not contend respondent could have appealed.

25 Cal.3d at p. 697.) On appeal, the defendant challenged the trial court's admission of the later statements and physical evidence. The People sought review under section 1252 of the trial court's suppression of the first statement. (*Id.* at p. 694.)

This Court determined that the People could raise the issue under section 1252 because they could not have appealed the ruling directly. (*Braeseke*, *supra*, 25 Cal.3d. at p. 700.) The Court further found that any other holding would have been "patently unreasonable." (*Ibid.*) The defendant's challenge to the admissibility of the later statements and physical evidence was premised on the validity of the trial court's ruling regarding the first statement. (*Ibid.*) Moreover, preventing the People from using section 1252 to seek review would have resulted in a clearly erroneous trial court order being binding on this Court. (*Ibid.*) The Court accordingly "conclude[d] that the People may, on an appeal by the defendant and pursuant to the provisions of section 1252, obtain review of allegedly erroneous rulings by the trial court in order to secure an affirmance." (*Id.* at p. 701.)

Here, appellant has raised several issues challenging the validity of the lying-in-wait special circumstance, which the trial court struck. (AOB 24-42, 53-56, 132-141.) As in *Braeseke*, it would be "patently unreasonable" to address these claims without first considering the validity of the trial court's ruling.

Although appellant is now asserting the trial court had authority to strike the special circumstance jury finding, appellant's claims on appeal necessarily presume that the trial court's ruling was invalid. In particular, appellant is challenging the sufficiency and constitutionality of a special circumstance that was ordered stricken. Appellant's claims are thus illogical, or are improperly seeking an advisory opinion about an issue not before the Court, unless the trial court's ruling is first examined and found invalid.

In this sense, just as in *Braeseke*, appellant's claims are "premised on the validity of the [trial court's] ruling." (*See Braeseke*, *supra*, 25 Cal.3d at p. 700.) The only difference is that the defendant in *Braeseke* was relying on the trial court ruling being held valid, whereas appellant here would require the trial court's ruling to be invalid for the Court to properly reach his claims. In both situations, appellant is asking the reviewing court to pass upon the validity of the trial court's ruling. As such, this is the kind of situation that "the Legislature may well have had in mind when it added this provision to section 1252." (*Ibid.*)

B. The Issue of the Trial Court's Authority to Strike the Special Circumstance Was Sufficiently Raised by Appellant's Opening Brief

Regardless of whether section 1252 applies here, the Court may reach the issue of whether the trial court was authorized to strike the lying-in-wait special circumstance jury finding because it was sufficiently raised in appellant's opening brief.

As already mentioned, appellant's opening brief challenges the lying-in-wait special circumstance on multiple grounds. Appellant's first issue challenges the sufficiency of the evidence supporting the lying-in-wait special circumstance. (AOB 24-42.) Appellant's third issue argues the jury acted unreasonably in finding the lying-in-wait special circumstance true because it was not supported by substantial evidence. (AOB 53-56.) Appellant's tenth issue asserts that the lying-in-wait special circumstance violated the Eighth Amendment. (AOB 132-141.) Within appellant's first claim, he describes the trial court's striking of the special circumstance pursuant to section 1385 after the jury found it true. (AOB 24.) Appellant also sets out section 1385.1, which prohibits the trial court from striking a special circumstance jury finding. (AOB 24, fn. 27.)

Although appellant's brief does not discuss the validity of the trial court's ruling directly, he sufficiently raises this issue to permit this Court to address it. Indeed, as discussed above, it is necessary for the Court to address that issue before it can logically reach appellant's claims challenging the presently-stricken lying-in-wait special circumstance.

C. Section 1385.1 Prohibits a Trial Court from Striking a Special Circumstance Jury Finding under any Provision of Law

Appellant finally asserts that even if this Court reaches the issue of the trial court's authority to strike the special circumstance, the trial court's decision should be upheld. (App. Letter Brief at 4-5.) This Court ordered that appellant's letter brief be "limited to addressing Penal Code section 1252 as it relates to the matters in this case." (Order of May 20, 2011.) As such, appellant's discussion of whether the trial court was authorized to strike the special circumstance is improperly raised and should be disregarded. To the extent the Court considers this argument, however, respondent contends the trial court acted without authority when it struck the lying-in-wait special circumstance after the jury found it true.

The language of section 1385.1 is clear:

> Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive.

In statutory construction, the Court "'begin[s] with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]'" (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214, quoting *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211; *People v. Briceno* (2004) 34 Cal.4th 451, 459 [applying same principles to voter initiative].)

The statute's language here is unambiguous. A court "shall not strike or dismiss any special circumstance which is . . . found by a jury." (§ 1385.1.) Appellant attempts to limit this statute's plain language by claiming it was only intended to prevent a court from striking a special circumstance when the striking would alter the defendant's sentence. Appellant then asserts that the statute does not apply here because the sentence of death was not altered by the trial court's striking of the lying-in-wait special circumstance. (App. Letter Brief at 4.) No authority has so limited section 1385.1, nor would such a limitation comport with the statute's plain language.[3] The statute prevents a court from striking "any special circumstance . . . found by a jury." If the statute had been intended to apply only when a sentence would be altered by the striking, it could easily have said so. It did not, and its plain meaning should control.

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[3] Appellant bases his interpretation on a comment in a footnote of a 1991 case stating that section 1385.1 "appears to be a direct response to our opinion in *People v. Williams* (1981) 30 Cal.3d 470." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 17.) Section 1385.1 was added by Proposition 115, the "Crime Victims Justice Reform Act," which was intended to scale back criminal defendants' rights to those established by the United States Constitution. (Proposition 115, § 1, quoted in 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Intro—Crimes, § 107, p. 163.) Therefore, even if this section was prompted by the Court's holding in *Williams*, appellant's limited construction would hinder the voters' intent in passing Proposition 115.

Appellant also reiterates his argument that the trial court essentially misspoke when relying on section 1385 to strike the special circumstance, and asserts that "other provisions of the law" provided adequate authority. (App. Letter Brief at 5, fn. 5.) However, section 1385.1's prohibition of striking a special circumstance jury finding exists "[n]otwithstanding Section 1385 *or any other provision of law*." (§ 1385.1.) Again, the statute's plain language governs against appellant's limiting interpretation.

Accordingly, the trial court was not authorized to strike the lying-in-wait special circumstance, and this Court may properly review that decision.

II. APPLICATION OF SECTION 1252 DOES NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS

Appellant's due process claim is premised on section 1252 being an inappropriate vehicle for reviewing the trial court's ruling here. (App. Letter Brief at 5.) Because the trial court's ruling may properly be reviewed under section 1252, as fully discussed above and in respondent's previous letter brief, there is no due process violation.

Appellant also asserts that this issue is unfairly raised at a late stage in the proceedings and thereby constitutes "undue harassment" and "an arbitrary application of the law." (App. Letter Brief at 5-6.) However, appellant was the first one to discuss the trial court's striking of the special circumstance, citing section 1385.1 in his opening brief. (AOB 24.) Respondent more explicitly raised the issue of the trial court's authority to strike the special circumstance in its respondent's brief, filed on April 1, 2008. Appellant responded to the issue in his reply brief, filed on January 6, 2010.

By its nature, an issue raised via section 1252 is properly raised in the respondent's brief. More importantly, as fully discussed above, this issue is directly related to three claims raised by appellant in his opening brief. Indeed, the issue of the trial court's authority to strike the special circumstance jury finding must be reached before the Court can logically address appellant's related claims. This issue was therefore not raised at a late stage, and addressing it is not either harassing or arbitrary.

Appellant implies that he would have been better able to address the issue if it had been raised in a writ, but he does not explain how this is so. Appellant had more than a year and a half to review, research and consider the issue before filing his reply brief. Even assuming writ proceedings would have been appropriate, the expenditure of judicial time and resources in that separate action would have been excessive compared to raising the issue on automatic appeal under section 1252. In short, the efficient use of resources

in the manner provided by law is neither "undue harassment" nor "an arbitrary application of the law."

For all of these reasons, appellant's due process rights would not be violated by the Court addressing the trial court's authority to strike the lying-in-wait special circumstance.

Respectfully Submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Ronald Mendoza***
No.: **S065467**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 20, 2011, I served the attached **LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 2011, at Los Angeles, California.

Marianne A. Siacunco
Declarant

Signature

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